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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

NELSON FRANK HUME,

Defendant and Appellant.

C068793

(Super. Ct. No.
CRDF10581)

Defendant Nelson Frank Hume entered a negotiated plea of no contest pursuant to *People v. West* (1970) 3 Cal.3d 595 to assault with a firearm and to the use of a shotgun in exchange for dismissal of other counts, a stipulated eight-year prison sentence with execution suspended, and a grant of formal probation with no further custodial time. The court granted probation for a term of five years subject to certain terms and conditions including an order that he pay \$1,000 in attorney fees and stay away from the victim and six other people.

Defendant appeals. He challenges the order to pay attorney fees and the order to stay away from all named persons other than the victim of the offense. We strike the attorney fees order and remand for a court determination after a hearing at which evidence may be presented to properly support an order. We strike the stay away orders for all except the victim and two others, since to the latter, the victim was living with both and defendant made threats involving one of them during the same incident set forth hereafter.

FACTS AND PROCEEDINGS

On December 4, 2010, the 66-year-old defendant entered the home where Travis B. lived with his father Kenneth B. Defendant lived across the street in his mother's home. Defendant is Travis's uncle or great-uncle. Defendant kicked down the bathroom door, pointed a shotgun at Travis who was in the bathroom at the time, and threatened to kill Travis, Kenneth, and then himself. Defendant put the shotgun down, removed a pistol from his jacket pocket and pointed it at Travis's head, stating that he did not "'want to make a mess.'" Travis saw another handgun in defendant's pants pocket. Defendant then left and returned to his mother's home. The police arrived and found defendant on the ground in the backyard of another home, yelling for help. He apparently fell in an attempt to climb over the fence. A search of defendant revealed several knives. He was taken to a hospital.

A search of defendant's mother's home pursuant to a warrant revealed two pistols, both loaded and chambered with ammunition, an unloaded pistol, a sawed-off shotgun chambered with one round of birdshot and four more in the magazine, a trench knife, a bayonet, a semi-automatic rifle, two additional rifles, a flare launcher with two flares, knives, ammunition, a blowgun, a cane sword, and a hand grenade. Officers also found four grams of marijuana in two containers and a glass smoking pipe commonly used to smoke methamphetamine. When interviewed, Travis was concerned that defendant may have been under the influence of methamphetamine.

DISCUSSION

I

Attorney Fees

Defendant contends the trial court erred in imposing \$1,000 in attorney fees without (1) a hearing, (2) a finding of an ability to pay, and (3) any support in the record.

The probation officer recommended that the court find that defendant had the "future financial ability to pay," among other fees, fines and restitution, the cost of attorney fees pursuant to Penal Code section 987.8 "in an amount as determined by the Court." The probation officer noted that although defendant began living with his mother after an accident, he owned a home where he had previously resided. The probation officer reported that defendant was retired, had not been employed for five years, and started receiving \$624 per month in Social Security

when he turned 62 years of age in 2006. Defendant reported to the probation officer that he was in poor physical health. Defense counsel noted that defendant had had a couple of strokes, walked with two canes, and would not be able to obtain employment.

In granting probation, the court ordered defendant to pay various fees and fines. Prior to imposing the fees and fines, the court ordered defendant to "report forthwith to the Court Collections Division for a financial evaluation. And that case-related costs shall be paid through and as directed by the Court Collections Division. The Court will find that defendant has the future financial ability to pay" the costs and payments recommended by the probation officer. The court ordered defendant to "pay the cost of attorney's fees that have been incurred by the Public Defender's Office in an amount to be determined by the Court. And that would be--I'm assuming [a] follow-up hearing [is] scheduled after a financial evaluation has been done by Court Collections." When asked to confirm, defense counsel responded that "the Court usually imposes attorney's fees at the time of sentencing" but made no request. The court then imposed \$1,000 as attorney fees. The probation order reflects the \$1,000 attorney fee order as a cost of probation subject to civil judgment and collection procedures.

Defendant contends there was no hearing and no evidence to support the court's order of \$1,000 for attorney fees. The People argue that defendant had a hearing (the sentencing hearing) and notice (the probation officer's recommendation in

the report that the court order attorney fees). The People also assert that defense counsel invited the court to address attorney fees at the time of sentencing. The People concede that there is no evidence to support the amount of \$1,000, requiring remand for the trial court's determination of the actual costs incurred by the public defender's office. In reply, defendant claims there was no finding of his ability to pay which must be considered on remand as well.

Penal Code section 987.8, subdivision (b) provides that after notice and a hearing, "the court may . . . make a determination of the present ability of the defendant to pay all or a portion of the cost" of the public defender and "may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

Here, the trial court simply ordered attorney fees in the amount of \$1,000. The court also ordered defendant to go to the Court Collections Division for a financial evaluation although, at least so far as we can tell from this record, defendant was never heard as to his ability to pay attorney fees either in court or at the Court Collections Division. Further, there is no evidence in the record supporting the amount ordered. The trial court asked defense counsel whether he had a request and hearing none, the court simply ordered \$1,000. Here, the amount of the attorney fees "is entirely unsupported by evidence" and

has been "allowed without opposition." (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.)

II

Stay Away Order

Defendant contends that the trial court exceeded its jurisdiction and imposed unreasonable stay-away and no-contact orders with respect to several people who were not the victims.

The information charged defendant with offenses on December 4, 2010, when he assaulted Travis with a shotgun, threatened to kill Kenneth, and was found to be in possession of numerous firearms and explosives. Defendant entered his plea to assault with a firearm and admitted he used a shotgun.

As a condition of probation, the probation officer recommended that the court order defendant to "[h]ave no contact with Travis B. and Kenneth B.; and remain 25 yards from their person, residence, place of employment, and school."

The probation officer included "defendant's brother-in-law, Kenneth B., in the no contact order as [defendant's] statements made during the present offense indicate a like amount of animosity toward Kenneth." The report did not identify anyone else who required a no-contact/stay-away order.

In a letter to the court, Cindy H. recounted an incident which happened "[y]ears ago." She and Dale H., her husband and defendant's older brother, bought a boat and defendant wanted to borrow it. When they refused, defendant, in the presence of their daughters, threatened to burn their boat and their house down. On another occasion, the time was not specified,

defendant "beat up his own father" when he was dying of cancer and defendant's mother asked defendant's sister not to tell Dale. Cindy H. claimed that the family "has always been afraid of [defendant] . . . and given the right circumstances [defendant] would kill us." The letter is signed by Cindy and Dale H.

In a letter to the court, Donna L., Travis's mother who lived six blocks from defendant and worked as a substance abuse counselor for another county's probation department, claimed that after defendant threatened Travis, Travis went directly to her home and explained what had happened. Lester claimed that defendant "has threatened [Travis] and other family members with weapons for many years." She claimed that defendant tried to kill Travis because Travis "broke a window in an abandoned trailer" at defendant's prior residence. She does not state where she obtained this information.

Lester recounted an incident "[t]wo years ago" when she was helping Travis's grandmother: defendant "threw a grenade at [her] and laughed stating that it was harmless" and it was "the same grenade he was found in possession of at the time of his arrest." Lester did not explain how she knows it was the same grenade.

Lester also made other accusations: defendant "has acted as if he is above the law and for many years he has gotten away with threatening and hurting people without consequence"; he "has access to weapons and has always lived his life surrounded by firearms and ammunition" and she believed "there are weapons

in his home"; he "has used methamphetamine for 30 years and is exhibiting dangerous psychotic behavior"; and she believed that he "will seek revenge on anyone who has been involved with this case or spoken out against his criminal acts."

Lester claimed there were "several family members who are afraid to write letters detailing their experiences for fear that [defendant] will retaliate against them" and follow through with his threats. She was terrified that defendant will hurt or kill Travis and fearful that defendant will "target" her and her children, family, and animals. She wanted defendant sent to prison to ensure the safety of her family. She also asked for the "court[']s protection" for Travis and "other family members who have been affected by [defendant's] blatant disregard for the law and the rights of others."

At sentencing, the court stated that it had not seen Lester's letter, nor had defense counsel or the probation officer.

The probation officer did not change her recommendation of a grant of probation, noting there was no record of any contact with the police department or other similar information. She did recommend expanding the stay-away/no-contact order "to include any family members that Donna [L.] would want to be included on the probation order." The court had seen Dale and Cindy [H.'s] letter but the prosecutor, defense counsel and the probation officer had not. The court noted that the [H.'s] letter was similar to Lester's letter, "a little less specific" and did not "indicate any specific criminal history that was

ever reported." The probation officer recommended that the H.'s be included on the list of protected persons.

Defense counsel requested that any stay-away/no-contact orders were made "reciprocal so that the [B.] side of the family doesn't go and try to antagonize [defendant] so far as the proximity of their residences are so close to one another." The prosecutor opposed reciprocity, noting that the other parties were not subject to the court's jurisdiction. The prosecutor requested that the order should include Travis and Kenneth, as recommended by probation, and Dale and Cindy H., Donna L., Lester's other son James C., and Yvonne B., defendant's older sister.

The court then turned to victim impact statements. Neither Travis nor Kenneth spoke but Lester did. Lester admitted that she did not know defendant and had "spoken 15 words to him in 23 years." She associated with his family because she had "a son by his nephew," spoke with Yvonne "occasionally," and until the present incident, had "been in good contact" with defendant's mother.

Lester related an incident which she claimed occurred in court several months earlier. She claimed that defendant threatened Travis and her in the courtroom, "mouthing words, 'I'm going to f-ing kill you.'" Lester disputed that defendant used canes and claimed that he edged and mowed his yard and "walk[ed] right down the street to his drug dealer and gets his drugs."

When the court asked whether Lester had reported defendant's courtroom threats, she claimed she made a report at the sheriff's department. Defense counsel refuted her claim, noting that his investigator had interviewed the deputy sheriff who heard Travis say that defendant had threatened to kill Travis but the deputy sheriff said defendant did not. Lester replied that defendant mouthed the words and that the deputy had her back to defendant. Lester claimed that other unidentified people saw it too.

The court noted that defendant had been released from jail in March 2011 and there had been no incidents reported. The probation officer commented that there had not been any history of restraining orders.

In granting probation, the court ordered that "defendant have no contact with Travis [B.] and Kenneth [B.], Dale and Cindy [H.], Donna [L.], James [C.] . . . , and Yvonne [B.]."

Defense counsel objected "to any protective order being in place for anybody that is not an actual victim in this crime. That just leaves Travis [B.]. There's no Harvey waiver associated with Kenneth [B.] that I remember. Yvonne [B.] had nothing to do with this case, neither did Ms. [L.], neither did Dale and Cindy [H.]. I don't think it's appropriate to have protective orders issued for people that weren't actually part of the case and the plea."

Penal Code section 1203.1, subdivision (j), provides, in relevant part, as follows:

"The court may impose and require any or all of the

above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of the public offense involved."

"The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. [Citation.] A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) The *Lent* factors "are conjunctive, not disjunctive." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624, fn. 4.) "'Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid

under the three *Lent* criteria.' [Citation.]" (*People v. Anderson* (2010) 50 Cal.4th 19, 32.)

Defendant argues there is no relationship whatsoever between his offense and the stay-away/no-contact order for Kenneth, Yvonne, Cindy and Dale H., Donna L., and James C. He was not charged with any offense against these people other than Kenneth but the offense involving Kenneth was dismissed without a *Harvey* waiver.

Even though Kenneth was not the victim of defendant's crime of assault with a firearm, defendant threatened to kill Kenneth, Travis's father, with whom Travis lived. Since the condition that defendant stay away from Kenneth is related to the crime for which defendant was convicted, that is, in committing that crime defendant also threatened Kenneth with whom Travis lived. As to them, the probation condition was not an abuse of discretion.

The stay-away order with respect to Yvonne is also valid. Although the record is not entirely clear, it appears Kenneth and Travis live with Yvonne. Because Travis was assaulted with a firearm in Yvonne's house and Kenneth lives with her as well, the stay-away order is not an abuse of discretion. (See *Lent*, *supra*, 15 Cal.3d at p. 486 [condition of probation that requires conduct is valid if conduct is reasonably related to crime of which defendant was convicted or future criminality].)

But the stay-away orders are invalid with respect to Cindy and Dale H., Donna L., and James C. Nothing in this record, other than unsubstantiated claims which the probation officer

did not investigate, suggests that defendant resorts to violence as a result of his contact and interaction with these people. As the probation officer stated in her report and at sentencing, there had been no reports to the police about defendant about any of the conduct alleged by Lester and the [H.'s].

Thus, as to these persons, all three *Lent* factors apply: (1) their complaints, while we do not minimize their concerns, have no relationship with the crime of assault with a firearm on Travis; (2) the complained of conduct was not verified or otherwise shown to have been criminal; and (3) on this record, the stay away order as to them would forbid conduct not shown here to be reasonably related to criminality.

"Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation, without all of the technical limitations determining the scope of the offense of which defendant was convicted. In determining where to draw the line between what is a reasonable and what is an unreasonable condition, common sense and reason must limit the court's discretion." (*People v. Miller* (1967) 256 Cal.App.2d 348, 356.) The stay-away/no-contact orders with respect to Cindy and Dale H., Donna L. and James C. given their unverified claims in the record before us, are not reasonable. If defendant poses a threat to them, they can separately seek a restraining order against him based on admissible evidence.

With respect to defendant's claim concerning knowledge of the presence of the protected people, this court has already addressed the issue. As we stated, because "as a matter of law,

. . . a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter," we "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action to be undertaken knowingly," so that it is unnecessary "to seek modification of a probation order that fails to expressly include such a scienter requirement."

(*People v. Patel* (2011) 196 Cal.App.4th 956, 960-961.) Although recognizing *Patel* applies here, defendant argues that nothing "deal[s] with potential and likely actions of the persons named in the probation condition to put themselves in a location where they can then attempt to have [defendant's] probation revoked." Defendant cites Cindy H.'s letter to the court after sentencing expressing her approval of the sentence and stating, "I can't wait until he gets caught by Probation."

As we have previously discussed, we have found the order with respect to Cindy H. invalid on the record before us. And if Travis, Kenneth, or Yvonne attempt to manufacture a violation of the orders as to them, we are confident the matter can be sorted out in a future hearing for a violation of probation should such a petition be filed.

DISPOSITION

The judgment of conviction is affirmed. The order of probation is modified, striking the attorney fees order and the stay-away/no-contact orders with respect to Cindy and Dale H., Donna L., and James C. The matter is remanded to the trial

court for a hearing on the amount of attorney fees. In all other respects, the order of probation is affirmed.

_____HULL_____, Acting P. J.

We concur:

_____BUTZ_____, J.

_____MAURO_____, J.